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No. 73

Supreme Court of the United States

OCTOBER TERM, 1950

PHILLIPS PETROLEUM COMPANY, a corporation,
Appellant,

VERSUS

THE STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, PEERLESS OIL AND GAS COMPANY, a corporation, COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, and CITIES SERVICE GAS COMPANY, a corporation,
Appellees.

RESPONSE TO MOTION OF APPELLEES TO DISMISS

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October, 1950

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RESPONSE TO MOTION OF APPELLEES TO DISMISS

Appellees move to dismiss this appeal on the ground that the record does not show that appellant, Phillips Petroleum Company, "is or will be injured or affected" by the order appealed from and therefore has no standing to question the correctness of the decision of the Oklahoma Supreme Court upholding the same. The authorities cited by appellees merely state the general rule that the validity of a statute or other legislative enactment may not be attacked as being unconstitutional by a party "whose rights are not affected by it," or against whom "it is not being or is not about to be applied to his disadvantage," or who "is not injured thereby," or is "not in the class

affected," or who suffers injury only "in some indefinite way in common with people generally." Appellant takes no issue with such statements of the general rule.

Appellant does not come within the rule. This case does not come within the rule.

Order No. 19514 of the Oklahoma Corporation Commission complained of in this case (R. 11, 18) provides:

"ORDER

"It Is Therefore Ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That no natural gas shall be taken out of the producing structures or formations of the Guymon-Hugoton Field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.

"2. This order shall be effective as of January 1st, 1947.

"Done and Performed by the Corporation Commission at its office in the Capitol Office Building, Oklahoma City, Oklahoma, this 9th day of December, 1946."

The Act pursuant to which the order was made provides for severe penalties for its violation.

The Supreme Court of Oklahoma in the judgment appealed from (R. 895, 914, 220 Pac. [2d] 279, 290) said, "The regulation applies to the production of natural gas."

It is not questioned that appellant is an owner and producer of gas in the Guymon-Hugoton Field to which

the order applies. This is acknowledged in the motion to dismiss. The Corporation Commission so found (R. 854).

Thus presented is a situation where an owner and producer of gas, otherwise free to produce, sell and dispose of such gas at such price and on whatever terms it sees fit, is expressly prohibited from so doing except upon the terms named in the order.

It is elementary that the right of an owner to possess, manage, use and dispose of its property, together with the right to fix the price and terms of sale, is an inherent right of property subject to the protection of the XIV Amendment to the United States Constitution. *Buchanan* v. *Warley*, 245 U. S. 60, 74; *Tyson & Bro.* v. *Blanton*, 273 U. S. 418, 429; *Washington ex rel. Seattle Title & Trust Co.* v. *Roberge*, 278 U. S. 116; 11 Am. Jur. 1146, Sec. 335; 16 C. J. S. 1196, Sec. 599.

The order in question directly and presently, day by day, takes from and deprives appellant of such vested property right. Appellant is in the class to whom the order applies. The order has continuing application and purports to be self-executing.

The fact that the Supreme Court of Oklahoma has assumed jurisdiction and passed on the constitutional questions involved herein is tantamount to a holding that the appeal was proper and that appellant had sufficient interest to maintain the same. Where under such circumstances the Supreme Court of the state actually considers and passes upon the question raised as to the validity of a state statute or legislative order upon grounds of its repugnancy to the United States Constitution and decides in favor of its validity, this Court has jurisdiction on appeal.

and will not inquire how and when the constitutional question was raised. *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182, 185; *Chicago, Rock Island & Pacific Railway Co.* v. *Daniel J. Perry*, 259 U. S. 548, 551; *Nickey* v. *Mississippi*, 292 U. S. 393; *Whitfield* v. *Ohio*, 297 U. S. 431, 435.

The foregoing rule and the authorities cited thereunder constitute a complete answer to appellees' motion to dismiss. Nevertheless, if there may be ignored the necessary result of the decision of the Supreme Court of Oklahoma to the effect that appellant was so affected by the order as to entitle it to assert its constitutional rights, the record in this case shows that contrary to appellees' position appellant was so affected.

The appellees rely on parts of the following findings by the Corporation Commission in its Order No. 19702 dated February 4, 1947, denying appellant's application to vacate Order No. 19514, to the effect that appellant was at the time realizing the "equivalent of approximately 7¢ per thousand cubic feet" for its gas at the wellhead and because thereof say, as did the Corporation Commission, that appellant is not injured.

For more convenient reference we quote in their entirety the findings so referred to (R. 854, 856. Emphasis is ours):

> "4. That Order No. 19514 had for its purpose the fixing of a minimum price for natural gas at the wellhead in the Guymon-Hugoton Field, which *price was applicable to all producers*, purchasers and takers of gas in the field; that the applicant herein, Phillips

Petroleum Company, is both a producer and taker of natural gas in the field and transports the gas produced from its leases in Texas County, across the Oklahoma line to a gasoline plant located in Texas one-half mile south of the Oklahoma line adjacent to Texas County, Oklahoma; that all of the gas produced by Phillips Petroleum Company in Texas County, Oklahoma, is transported to said plant where 6/10ths of one gallon of liquid hydrocarbons are extracted from each thousand cubic feet of gas produced in Texas County, Oklahoma; that the residue gas is then transported by Phillips Petroleum Company from said plant to the nearby location where same is delivered to the Panhandle Eastern Pipe Line Company at a price *presently* in the amount of 4.67 cents per thousand cubic feet; that the applicant herein then transports daily some 80,000 gallons of liquid hydrocarbons extracted from the natural gas at the plant in Texas, to another plant owned by applicant near Borger, Texas, where the liquid hydrocarbons are then further refined and sold by the applicant herein; that the larger percentage of the liquid hydrocarbons extracted is 26.70 gasoline which has a *current* market value of between 5 and 5¼ cents per gallon; that the applicant herein, Phillips Petroleum Company, *is now* realizing from the natural gas produced in the Guymon-Hugoton Field, the *equivalent of approximately* 7¢ per thousand cubic feet at the wellhead within the terms and meaning of Orders Nos. 19514 and 19515; that the applicant, Phillips Petroleum Company, did not see fit to introduce any evidence as to profits or leases from the production of natural gas in the Guymon-Hugoton Field and since the applicantion filed herein alleged hardship if forced to comply with Orders Nos. 19514 and 19515, it was incumbent upon the applicant to introduce proof showing wherein such hardship would occur.

"5. That applicants complain that paragraph 1 of Order No. 19514 and paragraph 4 of Order No. 19515 prohibit said applicant from producing any natural gas in the Guymon-Hugoton Field, and taking same from the formation because of the requirement that said gas must be sold at a price of 7¢ per thousand cubic feet at the wellhead; that said orders were meant to prohibit the production of natural gas from the producing formations in said field unless same was sold at a price of 7¢ per thousand cubic feet on the measurement basis provided for in said orders, if same were sold, but if not sold, that said gas should be so utilized and/or sold, that the producer would realize therefrom the equivalent of 7¢ per thousand cubic feet at the wellhead and on the pressure basis provided for in Orders Nos. 19514 and 19515; that the applicant, Phillips Petroleum Company, is realizing from the utilization and sale of natural gas produced by it in the Guymon Field, the equivalent of 7¢ per thousand cubic feet at the wellhead, on the pressure basis of measurement provided for in said orders for all natural gas produced by it in the Guymon-Hugoton Field; therefore in that respect applicant is already complying with Orders Nos. 19514 and 19515.

* * * * * * *

"7. That applicant herein, Phillips Petroleum Company, is not injured by the application of a 7¢ price of all gas produced by it in the Hugoton Field since it is *presently* realizing *approximately* that amount *at this time.*"

The order of the Commission was as follows (R. 856):

"ORDER

"It is therefore ordered by the Corporation Commission of the State of Oklahoma, that this application to vacate Orders Numbers 19514 and 19515 here-

tofore issued by this Commission in this cause on the 9th day of December, 1946, be and the same is hereby denied.

"Done and Performed this the 4th day of February, 1947."

Appellees then say, "The orders thus clarified and interpreted give appellant no ground of complaint. Its operations are not affected by them."

Let us assume for the moment that such findings, instead of saying that appellant was at that time realizing the "equivalent of approximately 7¢ per thousand cubic feet" for its gas, it was a fact and the Commission had found that appellant was in reality being paid at that time the full price of "7¢" or more per thousand cubic feet at the wellhead in express compliance with Order No. 19514. Even such a fact and finding would not relieve Order No. 19514 of its direct and objectionable effect upon appellant. It would still remain an ever-present restriction and deny to appellant its right to at any other time utilize, sell or otherwise dispose of all or any part of its gas for any other purpose or under circumstances that would yield to it a lesser price. The order is a continuing order and is not limited to the time of hearing appellant's motion to vacate. The record shows and the findings of the Commission so indicate that the amount realized by appellant for its gas was not a fixed amount over a continuing long period of time but was subject to change at any time and from time to time based on a number of variables. For example, the Commission found that at the time of its order appellant was "presently" being paid 4.67¢ per

thousand cubic feet by Panhandle Eastern Pipe Line Company for the residue gas. The record shows that the contract price was only 4¢ (R. 880) and that the additional .67¢ was due to a requested enrichment of the gas by Panhandle Eastern Pipe Line Company (R. 832, 833, 844, 849, 850) pursuant to a supplemental agreement, which request could be withdrawn at any time (R. 893). As a matter of fact, such request was later withdrawn and the price again became 4¢. A part of the amount so found by the Commission to have been realized by appellant was based on the "current market value" of gasoline of between "5 and 5¼ cents per gallon." The Court knows of its own knowledge that the market value of gasoline fluctuates from time to time. That is the reason the Commission in its findings used the phrase "current market value." It did get as low as "two to three cents" (R. 849). The Commission was careful in its findings to use the qualifying terms "at this time," "is now" and "presently." If on any day or if during any period the amount so realized by appellant for its gas dropped below the price so specified in the order or to the extent that appellant had gas for which it had no market at the prescribed price, appellant would have no alternative under Order No. 19514 other than to shut in its wells.

Furthermore, said findings relate only to the gas then being produced by appellant. The record shows that appellant owned additional gas acreage in the field (R. 826, 827, 870). Mr. F. E. Rice, Vice-President of appellant, testified that he had occasion to seek markets for other gas of appellant in the same area and had made a study and

was familiar with the available markets for such gas (R. 846); that although he had negotiated for the sale of such gas on the best possible terms he had been unable to negotiate a contract nor did he know of a market that would yield to appellant a price therefor of 7¢ per thousand cubic feet at the wellhead (R. 846, 847). Unable to get a market for such other gas at the price prescribed by the Commission, appellant under the order would be forced not to drill for or produce such gas inasmuch as appellant would be prohibited by the order from selling such gas at a lower price.

Not only do the findings in the order denying appellant's motion to vacate fail to relieve Order No. 19514 of its direct and objectionable effect upon appellant but adds to appellant's indeterminable confusion in knowing if and when it is in violation thereof.

Appellant in its assignments of error attacks Order No. 19514 as unconstitutional because of being vague, indefinite and uncertain as applied to a producer, such as appellant, that does not sell and get a "price" for its gas at the wellhead or elsewhere in its natural state (R. 948). This Court in the case of *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, has said:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Order No. 19514 merely says that no gas shall be taken out of the producing formation "at a price, at the well-

head, of less than 7¢ per thousand cubic feet" measured at a pressure of 14.65 pounds per square inch. The order does not say whether or not a producer in order to produce its gas must sell the same to some purchaser at the wellhead to get such a "price," or if the producer otherwise utilizes its own gas or sells the same elsewhere or under different conditions than at the well, how or by what standard such producer is to determine the value of such use or the proceeds of such sale other than at the wellhead in relation to the prescribed wellhead price. If the findings in such order denying the motion of one of many producers in the field to vacate a general legislative order are sufficient to constitute an effective interpretation of such general order, which we doubt, then of course the interpretation by the Commission that all that is required where the gas is not sold at the wellhead is that the producer should realize "the equivalent of approximately 7¢ per thousand cubic feet at the wellhead" eliminates the first objection with respect to the necessity of an actual wellhead sale, but the finding in regard to the amount realized by appellant for its gas further confuses and makes more indefinite Order No. 19514 as to how and by what standards such "equivalent," "approximate" amount can be determined to in advance avoid violation of the order.

The facts in respect to appellant's disposition of its gas and the amount realized therefore are as follows: Appellant sold none of its gas at the wellhead or elsewhere in the State of Oklahoma (R. 827, 830, 831). Instead it, by means of an extensive pipe line gathering system,

gathered the gas from its wells to a central point in Hansford County, Texas, where it processed the same in a gasoline plant owned and operated by appellant for the extraction of its gasoline and other liquid hydrocarbon content (R. 827, 828, 830, 832). The processed residue gas, less so much thereof as was used for plant fuel, was then dehydrated and delivered to Panhandle Eastern Pipe Line Company under a contract for the life of the leases (R. 827-829, 832, 833). The point of delivery of the residue gas as established under the contract was in Hansford County, Texas, a short distance from the gasoline plant (R. 828). The raw gasoline and other liquid hydrocarbons extracted from the gas, as such, having no commercial value (R. 844), were transported by pipe line another fifty or sixty miles to a "central treater" owned and operated by appellant at Borger, Texas, where by fractionation and other refinement they were broken down into a number of products, principally 26-70 gasoline, butane and propane, some of which were sold and others consumed by appellant in its own operations or used in the manufacture of other products for use or sale (R. 842-844).

It is undisputed that the appellant was being paid at the time of the hearing 4.67¢ per thousand cubic feet for the residue gas measured on a 16.4-pound pressure base (R. 833). The Commission in said order merely found that appellant was receiving a price "of 4.67¢ per thousand cubic feet" without reference to the basis of measurement. It was not disputed and the Commission found that the liquids extracted from each thousand subic feet of gas amounted to .6 of a gallon (R. 842). The Commission in said order found that "the larger percentage of the

liquid hydrocarbons extracted is 26.70 gasoline which has a current value of between 5 and 5¼ cents per gallon." The undisputed evidence was that this "larger percentage" was 46/80ths, having the value per gallon ascribed to it by the Commission (R. 843, 844, 849, 850) and that the remainder was butane and propane, having a value of "two cents per gallon" (R. 849).

An analysis of the figures so found by the Commission, in the light of the details disclosed by the evidence, shows that for each thousand cubic feet of gas measured on a 16.4-pound pressure base, appellant, after gathering, processing and refinement, obtained .352 gallons of 26-70 gasoline of a value of 1.85¢ figured at 5¼¢ per gallon, and 2.84 gallons of butane and propane of a value of .496¢ figured at 2¢ per gallon. Converted to a 14.65-pound pressure base as required by Order No. 19514, the 4.67¢ price received for the residue gas on a 16.4-pound pressure base would amount to 4.17¢ per thousand cubic feet.

Adding these figures together to arrive at the gross proceeds or value realized per thousand cubic feet of gas measured on a 14.65-pound pressure base, after gathering, transportation, processing, refinement, sale, etc., we get the following answer:

Residue gas sales	4.17¢ per MCF
26-70 Gasoline	1.85¢ per MCF
Butane and Propane	.496¢ per MCF
Total	6.516¢ per MCF

Thus the total of 6.516¢ per thousand cubic feet is what the Corporation Commission of Oklahoma found was the "equivalent of approximately 7¢ per thousand

cubic feet at the wellhead, within the terms and meaning of Orders Nos. 19514 and 19515." How it can be said that the *gross* proceeds or value of the residue and refined by-products of the gas amounting to only 6.516¢ per thousand cubic feet without any allowance for cost of gathering, transportation, processing, refinement and sale "is equivalent to approximately 7¢ per thousand cubic feet" for the gas in its natural state at the wellhead within the meaning of Order No. 19514 is without comprehension on our part.

Thus with the fluctuation from time to time of the price received for or the value of the residue gas and by-products going to make up the *gross* amount realized by appellant for its gas and changing economics as related to the cost of gathering, producing, refining and selling such gas and its by-products, appellant is completely at a loss and without means to determine from time to time whether or not it is or is not in violation of the order. This, as said in the case of *Connally* v. *General Construction Co.*, *supra*, "violates the first essential of due process of law."

Appellant is further confused by the use in said findings of the language "approximately 7¢ per thousand cubic feet at the wellhead." Order No. 19514 unequivocally says "7¢". It does not say that anything less than 7¢ will suffice. What is approximate?

Under Order No. 19514 even as interpreted by Order No. 19702 appellant is not permitted to produce and use any of its gas for fuel in its own operations. It would have no way of knowing what value to ascribe to such use of the gas for fuel purposes. The order does not say. Yet the

use by a producer of its own gas for fuel in its own operations is a common and necessary use to which such gas is put.

Appellees urge that appellant cannot rely upon any increased obligation to its royalty owners resulting from Order No. 19514 as an injurious effect entitling it to attack the order because they further say that there is no evidence in the record showing the amount of such royalty obligation and that no basis has been laid therefor. With this we cannot agree. H. W. Long, appearing as witness for the proponents of the order and referring to the whole of the Guymon-Hugoton Field, testified: "These leases which were taken out there and the leases which are in existence now, without, I think, a single exception, provided that the land owner shall receive one-eighth of the market price at the mouth of the well." This evidence was undisputed. Specific reference to such an injury in the assignments of error would not be required inasmuch as it is merely one of many facts and factors supporting the general assignment that the order is arbitrary, unjust and unreasonable.

Appellees in their motion to dismiss do not mention any increased obligation to the State of Oklahoma on account of increased gross production taxes. Title 52, Oklahoma Statutes 1941, 321, levies a gross production tax "equal to five per centum of the gross value of the production of natural gas and/or casinghead gas" produced in the State of Oklahoma.

Thus it will be seen that appellant, a member of the class against which said Order No. 19514 is directed, is

vitally and adversely affected by such order even as interpreted by the order denying appellant's motion to vacate the same.

We respectfully submit that appellee's motion to dismiss herein is not well taken and should be denied.

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